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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 822

ROD RIC CORPORATION,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner prays that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in the above case on June 16, 1970. Petitioner's Motion for Rehearing was denied on August 25, 1970.

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit enforcing the Board's order is reported at ___ F.2d ____. The Court's order denying Petition for Rehearing was entered August 25, 1970. A Stay of Mandate was granted to and including October 9, 1970 on September 10, 1970.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on June 16, 1970 and copy thereof is appended to this petition in the Appendix at pp. 39 to 46. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The NLRB conducted a union election in connection with Petitioner's business and by order of its Regional Director, pursuant to a prior order of the Board, in the *Hondo Drilling Co. N.S.L.* (164 NLRB 67, May 8, 1967), allowed non-employees to vote. Company timely filed objections to the conduct of the election but was overruled and denied a hearing on its objections. Company filed request for review with the Board but it was denied by telegram. Company refused to bargain and the Board filed a refusal to bargain complaint. Company's answers clearly set out fact issues which require a hearing. The Trial Examiner granted the Board a summary judgment and the Board sustained the Trial Examiner, over objection by the company. The Board sought enforcement in the Fifth Circuit Court of Appeals. The Court enforced the Board's order without considering some of the issues raised by the pleadings of this Petitioner. The questions presented are:

(1) Whether the Fifth Circuit Court of Appeals may properly refuse to consider the erroneous, arbitrary and capricious acts of the

NLRB because of a purely technical procedural rule designed for the sole purpose of preventing court review of the Board's own actions.

(2) Whether the Fifth Circuit Court of Appeals may properly enforce the Board's order without consideration of all the defenses raised by Respondent company.

(3) Whether summary judgment procedure is authorized under the National Labor Relations Act or the Administrative Procedure Act when the pleadings raise fact issues.

(4) Whether the Board may legally overrule Petitioner's objections to an election without substantial evidence in the record.

(5) Whether the NLRB is required to follow the rule-making procedure of the Administrative Procedure Act when it establishes a voting eligibility rule for an entire indurtry in the Permian Basin contrary to its usual rules of eligibility.

(6) Whether the NLRB may make non-employees eligible to vote, permit non-employees to vote, and to deny employer the right to challenge such voters.

(7) Whether the NLRB is required to follow the spirit as well as the letter of the *Excelsior*

Underwear, Inc. (156 NLRB 1236) rule when employer has no direct access to persons no longer employed but made eligible to vote.

(8) Whether the foregoing acts of the NLRB and the Fifth Circuit Court of Appeals has denied Petitioner and its employees a full and fair hearing, and/or denied them their rights under the National Labor Relations Act, and/or denied them the protection of the due process of law guaranteed them by the Fifth Amendment to the Constitution of the United States, the Administrative Procedure Act and the Board's own rules and regulations.

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

The pertinent portions of the Fifth Amendment of the United States Constitution, Labor Management Relations Act, 1947, as amended (29 U.S.C. 152(3), 157, 159(a), 159(b), 159(c), 159(d), 160(a), 160(b), 160(c), 160(e)), Administrative Procedure Act (5 U.S.C. 1001 et seq., Sections 3, 4, and 5), and National Labor Relations Board Rules, Regulations, Section 102.67 (a), (b), (c), (d), (f) and (g), and Paragraphs 11.338 through 11.338.5, 11.340 through 11,340.3 of National Labor Relations Board Field Manual, are set forth in the Appendix at pp. 34 to 38.

STATEMENT

This case arose on the application of the NLRB for enforcement of an order issued against Rod Ric Corporation, Petitioner herein, pursuant to Section 10e of the Labor Management Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq).

Local 826, IUOE, AFL-CIO, filed a petition for an election on August 8, 1966, with the Sixteenth Region of the NLRB. The Regional Director conducted a hearing on September 27, 1966 at which time only the employer presented any evidence whatsoever pertaining to employees of the company. Petitioner is engaged in oil well drilling in the Permian Basin area of West Texas and Southeastern New Mexico, within a radius of 100 miles of Odessa, Texas. (R-63) Rod Ric had a continuous operation. It did not hire crews for each well but had permanent employees. The crews helped rig up, drill, rig down, move and rig up again, and so on. (R-65) Its Rig #2 operated or employed its crews 347 days out of the 365 day period from August 8, 1965 to August 8, 1966, or 95% of the total time. Rig #3 operated 349 days or 95% of the time. The third rig, #5, was only placed in service March 23, 1966 but operated 125 out of the next 139 days or 89% of the time. (Pet. Ex. 1-6) Each rig required three crews of three unit employees each. The company also employed three fulltime truckdrivers. It thus had a fulltime complement of 30 employees. (R-74, 75)

If an employee quit, at any time, he had no expectation of future employment with the company. (R-65)

Employer filed a Brief with the Regional Director on October 18, 1966 but the Regional Director delayed issuing his order until June 15, 1967 after the Board issued its decision and direction of election in the *Hondo Drilling Co. case* (164 NLRB 67, May 8, 1967) and *Carl B. King Drilling Company*, (164 NLRB 68, May 8, 1967) wherein the Board fashioned a formula for voting eligibility in the drilling industry in the Permian Basin area. (R-38-44) The Regional Director followed the *Hondo* and *King* rule of eligibility exactly. (SR-5, 6) At or about the same time the Regional Director issued eleven (11) other decisions and directions of election and set twelve (12) simultaneous elections for July 14, 1967. He used one (1) ballot box at each polling place for all twelve (12) companies. Employer objected to the method of holding this election but its objections were overruled. (SR-14, 15) Although the Decision and Direction of Election directed both union and company to cooperate to the fullest extent in preparation of eligibility lists in line with the spirit of the *Excelsior Underwear, Inc.*, (156 NLRB 1236) *case*, (R-43) the union failed to do so and the Regional Director failed to require it. (SR-7, 8)

As a result of the Board's failure to hold a pre-election conference to determine final eligibility, six (6) ineligible people were permitted to vote without challenge even though Employer's observers attempted to challenge them. (R-36, 37)

Employer was denied the right to challenge voting of non-employees. It timely filed objections to the election (R-46, 47) but the objections were dismissed after

little, if any, ex parte investigation (R-43-53, 35-37), constituting no part of this record. Employer timely filed request for review with the Board on November 27, 1967 (R-57-58) which was denied by telegram on December 19, 1967. (R-54)

Subsequently, the Board filed a complaint alleging unfair labor practice for refusing to bargain. Petitioner filed answers, including first and second amended answers. General Counsel filed Motion to Strike portions of Respondent's answers and for judgment on the pleadings. Trial Examiner denied the motion to strike the answers but granted judgment on the pleadings. (R-2-8) Petitioner timely filed exceptions with the Board. The Board sustained its Trial Examiner and adopted his recommended order on June 3, 1968. (R-14, 15)

REASONS FOR GRANTING THE WRIT

1. The decision below should be reviewed because it erroneously extended the meaning of Section 9(c) of the Labor Management Relations Act (hereinafter called the Act) and erroneously interpreted its power and responsibility of judicial review of the action of the NLRB and particularly the effect of Board Procedure Section 102.67(b) and (f).

Section 9(c) of the Act and Section 102.67 of the Board's rules only authorize the Board to determine whether a question of representation exists; to determine the proper unit for bargaining; and to direct an election. Only these items require a request for

review under Section 102.67. In this case the Board determined the proper unit for bargaining was:

> "All employees of the employer engaged in oil well drilling, Midland and Odessa, Texas, including truckdrivers, but excluding office clerical employees, professional employees, watchmen, drillers, toolpushers, and supervisors as defined in the Act."

The Board then went further and determined who were employees. This is a question that should properly be reviewable by the Circuit Court, without a request for review prior to the time of the election.

The Fifth Circuit said in *Air Control Products of St. Petersburg, Inc.*, 335 F.2d 245 (5th Cir., 1964):

> "The Section 9(c) (1) hearing is directed toward determining whether an election should be directed and the appropriate unit in which to hold the electon."

Petitioner has found no fault with the appropriate unit or that an election should be directed. The fault it finds is in the determination that former employees are eligible to vote and determine the rights with respect to working conditions of the actual employees of the company.

Since the lower Court sustained the General Counsel's contention that Petitioner waived its rights of appeal by failing to request a review, it must be pre-

sumed the Court did not review the record in the representation hearing. If the Court had read the record in the representation hearng, it would have found the record does not sustain the Regional Director's decision. It would have found the so-called *Hondo* voters did not have a reasonable expectation of re-employment, nor did they have a continuing interest in the working conditions of the Petitioner. It would also have found the facts in the *Hondo Drilling Co. N.S.L.*, 164 NLRB 67 (1967) and the *Carl B. King Drilling Company*, 164 NLRB 68 (1967) are at complete variance from the facts in Petitioner's case.

Even if the question of voter eligibility is included in Section 9(c) of the Act and 102.67 of the Regulations, Section 102.67(b) does not require a request for review but is merely permissive. Section 102.67(f) provides for the result in the event of failure to request review. That paragraph states:

> "Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been raised in the representation proceeding."

However, it further says:

> "Denial of a request for review shall constitute an affirmance of the Regional Director's action which shall *also* (italics added) preclude relitigating any such issues in any related subsequent unfair labor practice proceeding."

Since the Board,

> **".... found it necessary to resolve the question of voter eligibility by fashioning a new eligibility *rule* (italics added) to meet the problems of this industry" (oil well drilling industry) (*Carl B. King Drilling Company, Inc., supra* and *Hondo Drilling Co. N.S.L., supra*, both dated May 8, 1967)**

only 37 days prior to the Director's decision in this case, it would have been futile to request review. The facts in the *King* case were substantially different from the *Hondo* case but the Board followed the *Hondo* eligibility rule. Thus, it was perfectly obvious the Board would not have recognized any grounds for review required by Section 102.67(c). Denial of review would also preclude litigation.

The Fifth Circuit in *Hondo* said:

> **"The *Hondo* rule is merely the eligibility formula devised for the Hondo election; it does not purport to be an inviolate standard to regulate future situations. The fact that the same formula may have been employed in other elections is not controlling."**

However, the Board itself, in the *Carl B. King Drilling Company* case, said it had fashioned a new eligibility rule for the oil well drilling industry. If the Fifth Circuit must refuse to review Board action for failure to request review, it must also refuse if request is made

but denied. Thus the Board can always prevent review. There is no requirement in this Court's decisions that require an exercise in futility in order to secure court review.

This court has not foreclosed a court review of these proceedings if justice would thereby be served. In *U.S. vs. L. A. Tucker Truck Line* (344 U.S. 33, 34). the Supreme Court said:

> "Appellee did not offer any excuse for its failure to raise objection upon at least one of its many opportunities during the administrative proceedings."

In the instant case, objection was made during the administrative proceedings.

The acts of the Board in permitting non-employees to vote in a union election and thereby have the right to determine the bargaining rights of the actual employees and the Board's actions in denying Petitioner a hearing at some stage of the proceedings on the unfair labor practice or objections to the election, is erroneous, arbitrary and capricious and should have been reviewed by the lower Court. It is submitted the lower Court's interpretation of Section 9(c) of the Act and Section 102.67 (b) and (f) is not only erroneous but constitutes a denial of due process to Petitioner.

The Court erred in holding review was not appropriate because this case did not fall within the purview of its decision in *Board of Public Instruction vs. Finch*

(414 F.2d 1068, 5th Cir., 1969). Review is appropriate in this case because:

(1) The Board acted in excess of its statutory authority in allowing non-employees to vote;

(2) The decision will result in individual injustice because non-employees who have long since departed were permitted to determine the rights of actual employees to be represented and to determine working conditions of the actual employees of Respondent;

(3) It is disruptive of the legislative scheme because the legislative scheme provided that employees had a right to join or refrain from joining in concerted activities and by permitting non-employees to vote, the Board has denied the actual employees the right to refrain from such concerted activities or to be represented or not to be represented by a Union; and

(4) The Board abused its discretion in completely ignoring the facts developed in the representation case and adopting the *Hondo* voter rule contrary to the facts developed in the representation case. This is an important public policy extending beyond the rights of the individual employees of Petitioner because it opens the door for

the Board to do as it pleases regardless of the facts developed in representation cases.

2. The lower Court was in error when it failed to consider all the defenses raised by Petitioner.

(a) Section 160(b) of the Labor Management Relations Act, provides for a hearing in an unfair labor practice case and that the person complained of shall have the right to appear in person or otherwise and give testimony at the place and time fixed in the complaint. Petitioner was denied this right and even though set out in its answer to the petition for enforcement, the lower Court failed to consider it.

(b) Although Petitioner herein filed numerous objections to the election which the Board overruled, there is no evidence in the record to support the Board overruling of Respondent's objections.

Section 160(b) (Section 10c of the Act) requires the testimony to be reduced to writing and filed with the Board and the Board should make its decision upon the preponderance of the testimony taken.

There is no provision in the Labor Management Relations Act, the Administrative Procedure Act, nor the Board's own rules and regulations and statements of procedure authoriz-

ing a judgment on the pleadings without a hearing. Petitioner did all it could to get a hearing but was denied same by the Trial Examiner, the Board, and the Fifth Circuit Court of Appeals. This is certainly denial of due process.

(c) There is no evidence in the record to sustain the Board's overruling of Petitioner's objections to the election.

(d) The lower Court refused to consider the allegation that the Board denied Petitioner the right to challenge voters whom it considered ineligible to vote. Such denial contravenes the Board's own Field Manual instructions regarding challenges. See excerpts from NLRB Field Manual 11338 *et seq* found in the Appendix, pp. 34 to 38.

3. The lower Court was in error when it failed to consider an alleged illegal act committed by the Board. Fundamental justice requires the Court to consider whether non-employees were permitted to vote in the election. If they were, the election is illegal and should be overturned, regardless of the time the issue is raised. Otherwise the actual employees are denied their rights under the Act. Petitioner alleged in its answers to the unfair labor practice complaint that persons who were ineligible to vote, even under the voting eligibility rule established for Petitioner were permitted to vote and the Board refused to allow Petitioner to challenge these voters. Any illegal vote

should void the election and the lower Court should have considered this but it failed to do so.

4. The lower Court erred in holding the Board did not adopt a rule in violation of the Administrative Procedure Act when it fashioned a formula in the *Hondo* case. (*NLRB vs. Hondo Drilling Co.*, 5th Cir., 1970, #27943, June 16, 1970) The Board itself called the formula a "rule" in *King Drilling Co. case, supra*. The Board and the lower Court chose to ignore the complete difference between the employment practices of Petitioner and the *Hondo* and *King Drilling Company cases*. If the Board had not fashioned a rule of eligibility for the entire drilling industry, as stated in the *King Drilling Company case*, then under the facts of this case an entirely different rule would have applied. It is submitted, when the Board establishes a rule of general applicability it must follow the Administrative Procedure Act.

5. The lower Court misinterpreted the direction to furnish the names and addresses of all eligible voters by the Union as well as the employer as set forth in the Decision and Direction of Election. It stated:

> "In view of the nature of the employment in this industry, both the Union and the Employer are directed to cooperate to the fullest extent in the preparation and compilation of an election eligibility list containing the names and addresses of all eligible voters. In addition, we shall require that an election eligibility list containing the names and addresses of all known

> eligible voters be filed by the Employer with the Regional Director within seven (7) days after the date of this Decision and Direction of Election, and that a supplemental list containing the names and addresses of the remaining eligible voters be filed by the Employer with said Regional Director within seven (7) days after the issuance of the Notice of Election by the Regional Director. No extension of time to file these lists shall be granted by the Regional Director except in extra-ordinary circumstances. Failure to comply with these requirements shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear, Inc.*, 156 NLRB 1236."

It will be noted the foregoing is one complete paragraph. There is no distinguishing between the various lists required. The *Excelsior* rule was established for the purpose of allowing the eligible voters to hear both sides of the question. (See *NLRB vs. Wyman-Gordon Co.*, 394 U.S. 759) If the employer or the union did not have the names and addresses of such employees, and the employees were no longer employed by the employer, it would be impossible for the employer to tell the eligible voters its side. The *Excelsior* rule applied primarily to plants where employers had access to the names and addresses of all the employees because they remained constantly employed. The union, perhaps, did not have such lists. In the instant case, the Board has made people eligible to vote who are no longer working for the employer but who were probably available to the union. Otherwise, why would it

want them eligible? In light of the Board's purported great desire to protect the employee and provide him with knowledge from which to make his decision, it is imperative, in a case of this sort, the union be required to furnish a list. Any other reading of the *Excelsior* case would be erroneous.

6. The decision below has clearly failed to consider the Constitutional rights of the actual employees of Respondent. It is the rights of employees under the Act that are to be protected. The right of a person to contract with respect to his employment is a property right protected under the Fifth Amendment to the Constitution of the United States. This right has been limited by the Labor Management Relations Act, but it has not been destroyed by such Act. However, in this case the Board, with the concurrence of the Court below, would destroy entirely the rights of actual employees of Petitioner by permitting persons who are no longer employed by Petitioner; who have no expectancy of future employment; and who have no continuing interest in the working conditions of Petitioner; to determine whether or not the actual employees are to be represented by a union and to negotiate a contract for them. Under the facts shown if the election is allowed, it is almost certain the Union will negotiate a contract for employees it does not now represent and probably never represented. Wherein is there any limitation upon the power of the Board to permit non-employees to vote?

It has been three years since the election and the Board waited nearly two years after the election to

seek enforcement of its order. Surely, under the circumstances, it would not serve the purposes of the Act to require the present employees to be represented by Local 826 without a new election and one limited to those employees who have a continuing interest in the working conditions of Respondent.

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certified that three (3) copies each of Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in the herein styled case was mailed to each of the following, on the ____ day of October, A.D., 1970:

Solicitor General of the United States
Department of Justice
Washington, D. C. 20530
Honorable Marcel Mallet-Prevost
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APPENDIX

A. FIFTH AMENDMENT TO UNITED STATES CONSTITUTION

No person shall .... be deprived of life, liberty, or property, without due process of law, ...

B. LABOR MANAGEMENT RELATIONS ACT, 1947, AS AMENDED (29 U.S.C., 152, 157, 159, 160, ET SEQ.)

§ 152. Definitions

When used in this subchapter —

. . .

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

. . .

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title. July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140.

. . .

§ 159. Representatives and elections — Exclusive representatives; employees' adjustment of grievances directly with employer

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: . . .

Determination of bargaining unit by Board

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom

in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: . . .

Hearings on questions affecting commerce; rules and regulations

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board —

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

. . .

Petition for enforcement or review; transcript

(d) Whenever an order of the Board made pursuant to section 160 (c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

. . .

§ 160. Prevention of unfair labor practices — Powers of Board generally

(a) The Board is empowered, as hereinafter pro-

vided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: . . .

Complaint and notice of hearing; answer; court rules of evidence applicable

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: . . . Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable

in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

Reduction of testimony to writing; findings and orders of Board

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: . . . In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order

shall become the order of the Board and become effective as therein prescribed.

. . .

Petition to court for enforcement of order; proceedings; review of judgment

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party

shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

. . .

C. ADMINISTRATIVE PROCEDURE ACT (5 U.S.C. 1001 ET SEQ., SECTIONS 3, 4, 5)

60 Stat. 237 (1946), 5 USCA Sec. 1001 et seq. (1946)

PUBLIC INFORMATION

SEC. 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency —

(a) *Rules.* — Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

. . .

RULE MAKING

SEC. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts —

(a) *Notice.* — General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) *Procedures.* — After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in

any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) *Effective Dates.* — The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) *Petitions.* — Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

ADJUDICATION

SEC. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs func-

tions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives —

. . .

D. NATIONAL LABOR RELATIONS BOARD RULES AND REGULATIONS AND STATEMENTS OF PROCEDURE, SECTION 102.67 (a), (b), (c), (d), (f), (g)

SEC. 102.67. *Proceedings before the regional director; further hearing; briefs; action by the regional director; appeals from action by the regional director; statement in opposition to appeal; transfer of case to Board; proceedings before the Board; Board action.* — (a) The regional director may proceed, either forthwith upon the record, or after oral argument, or the submission of briefs, or further hearing, as he may deem proper, to determine the unit appropriate for the purpose of collective bargaining, to determine whether a question concerning representation exists, and to direct an election, dismiss the petition, or make other disposition of the matter. Any party desiring to submit a brief to the regional director shall file the original and one copy thereof, which may be a typed carbon copy, within 7 days after the close of the hearing: . . .

(b) A decision by the regional director upon the record shall set forth his findings, conclusions, and order or direction. The decision of the regional director shall be final: *Provided, however,* That within 10 days after service thereof any party may file eight copies

of a request for review with the Board in Washington, D.C. . . . The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of any action taken or directed by the regional director: *Provided, however,* That the regional director, in the absence of a waiver, may issue a notice of election but shall not conduct any election or open and count any challenged ballots until the Board has ruled upon any request for review which may be filed.

(c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(d) Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record. With respect to ground (2), and other grounds where appropriate, said request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. But such request may not raise any issue or allege any facts not timely presented to the regional director.

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(f) The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

(g) The granting of a request for review shall not stay the regional director's decision unless otherwise ordered by the Board. . . .

E. NATIONAL LABOR RELATIONS BOARD FIELD MANUAL, PARA. 11,338 AND PARA. 11,340 THROUGH 11,340.3

. . .

11338 Challenges: The challenge procedure provides a method whereby a voter's eligibility to vote may be called into question, the ruling on the question may be at least temporarily reserved, and the questioned voter may memorialize his desires in the event his desires should have relevance in the future — all without disrupting the regular flow of votes.

Any observer has the right to challenge a voter for cause. The Board agent must challenge anyone whose name is not on the eligibility list. Also, he must challenge a voter if he knows or has reason to believe that the voter is ineligible to vote, but, in this instance, he should not challenge until and unless none of the parties voices a challenge. The Board Agent will not make challenges on behalf of the parties, whether or not such parties have observers present.

The reason for the challenge should be stated at the time the challenge is made.

11338.1 Challenge procedure: When a voter is challenged, a small "c" is placed beside his name by the checking observers. (If his name does not appear on the list, it should be added, in a supplemental

list, and the "c" inserted.) The Board agent (at the checking table or, in a large election, at a challenge table) fills out the information called for on the stub of a challenged ballot envelope — the voter's name, clock number, job classification, employer, place and date of election, the reason given for the challenge, the identity of the challenger, and his (the agent's) initials. If time permits, he may elicit specific information surrounding the voter's status, for insertion on the reverse side of the stub, there to be initialed by the voter.

The voter is then given a ballot and instructed to enter the booth, mark the ballot, fold it so as to keep the mark secret and return to the voting table. Upon his return to the voting table, he is given a challenged ballot envelope. The *voter* places the marked ballot in the envelope, seals the envelope, and drops it in the box. Observers stationed at the voting booth area and/or the ballot box should make sure that the challenged voter, when he comes out of the booth, goes to the voting table and does not drop the ballot in the box before placing it in the envelope, and *sealing* the envelope.

11338.2 Notation of potential challenges: Observers may maintain lists of persons they intend to challenge, but the better practice is to permit the parties to note on the eligibility list, at the preelection check, the persons they intend to challenge. Any such marks made prior to an election, however, must be easily distinguishable from the marks to be made by observers at the election.

11338.3 Proper time to challenge: Challenges should be handled as they come up. Challenged voters should not be told to return later, and they should not be allowed to congregate in the polling place awaiting a slack period.

In the oral instructions to observers, they should be urged to challenge as the voter comes up to the checking table. Normally, a challenge should be made before the questioned voter receives a ballot.

11338.4 Merit of challenge should not be argued: Arguments on the merits of a challenge should not be permitted. The challenge steps outlined above should be taken quietly and quickly, and the regular voting flow should be impeded as little as possible. The Board agent should be prepared to explain to the voter, quickly and lucidly, the measures which will be taken to protect the secrecy of the challenged ballot.

11338.5 Exclusions in decision: Persons in job classifications specifically excluded by the Decision and Direction of Election should be refused a ballot, even under challenge. The Board agent must exercise discretion in deciding whether to allow a vote (under challenge) when the person presents plausible reasons for being permitted to vote despite the exclusion, or if his actually being within the excluded group is not without question.

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11340 Count

11340.1 Time and place: The count should take place as soon after the close of voting as possible.

If a number of polling places are involved, the count should not begin until all ballot boxes have been collected. If the voting hours have been long and arduous, if the count is expected to be drawn out (see below), and if the personnel participating in the count are the same as those who participated in the conduct of the election, the Board agent may allow a rest or meal period before the count. When there is any intervening interval extreme pains should be taken not only in preserving the intactness of the ballot box(es) but also in displaying this fact.

The count may take place at any centrally located place. Typically, in the small election, the count is taken at the polling place. In large elections, if one of the polling places is large enough, the tally can take place there.

11340.2 Persons present: The actual participants in the count are the Board agents and official observers, in the number necessary.

Also present may be members of the press and other interested persons to the extent permitted by the physical facilities. The Board agent in charge of the election should use his discretion in limiting numbers.

11340.3 "Clearing" challenges: Prior to the count, the parties may wish to dispose of some challenged

ballots (i.e., remove the challenge) by consent. Any such desires should be encouraged by the Board agent, but should not be *urged* by him if there is reluctance in any quarter.

Such clearance, on behalf of each party, should be done by someone specifically authorized so to act, not merely by any of the observers.

Finally, a challenging party may withdraw from his position on the basis of discussion with the Board Agent and other parties. In such event, though, other parties should be given the opportunity to challenge the same voter.

However — this is important — a challenge-clearance situation should not be allowed (1) to devolve into an argument on the merits, or (2) to delay the count unduly.

. . .

F. JUDGMENT OF THE FIFTH CIRCUIT COURT OF APPEALS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27942

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

ROD-RIC CORPORATION,
Respondent.

Application for Enforcement of an Order of the National Labor Relations Board (Texas Case)

(June 16, 1970)

Before RIVES, GEWIN and INGRAHAM,
Circuit Judges.

GEWIN, Circuit Judge: This case arises on the application of the National Labor Relations Board for enforcement of an order issued against Rod-Ric Corporation. The Board found that Rod-Ric had violated §§ 8(a) (5) and (1) of the National Labor Relations

Act[1] by refusing to bargain with Local 826, International Union of Operating Engineers (the Union), the certified representative of a unit of Rod-Ric employees. Rod-Ric seeks to justify its refusal to bargain on the grounds that the Union was improperly certified. We enforce the Board's Order.

Rod-Ric, a Texas corporation, is engaged in the business of oil well drilling in the area of Eastern New Mexico and West Texas known as the Permian Basin. Rod-Ric owns three drill rigs. When in operation, each rig requires three complete crews to permit around-the-clock operation. A crew is composed of a driller and three helpers or "roughnecks." A driller has the responsibility or hiring and maintaining his own crew of roughnecks. Rod-Ric's organization and activities are, in many respects, similar to those discussed in *N.L.R.B. v. Hondo Drilling Co.*,[2] though Rod-Ric contends that the nature of its business affords roughnecks a greater opportunity for continuous employment than is the case with other Permian Basin drilling companies.

Pursuant to the Union's petition for an election, the Regional Director held a hearing in which both the Union and the company participated. Following the hearing, the Regional Director issued his Decision and Direction of Election. He determined that an appropriate bargaining unit would include:

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[1] 29 U.S.C. §§ 158(a) (5), (a) (1).

[2] ——— F.2d ——— (5th Cir. 1970) [No. 27943, ———, 1970] decided this date.

> All employees of the Employer engaged in oil well drilling, Midland and Odessa, Texas, including truckdrivers, but excluding office clerical employees, professional employees, watchmen, drillers, tool pushers, and supervisors as defined in the Act.

The Regional Director also adopted a voter eligibility formula patterned after that employed by the Board in two prior representation proceedings involving Permian Basin drilling companies.[3] In addition to employees whose names appeared on the last payroll list prior to the Notice of Election, the formula enfranchised those who had been employed by Rod-Ric for a minimum of 10 days during the 90-day period preceding the Regional Director's decision and who had not been terminated for cause or quit voluntarily prior to the completion of the last job for which they had been employed. Rod-Ric did not seek Board review of these determinations by the Regional Director.[4]

The criteria adopted by the Regional Director rendered approximately 40 roughnecks eligible to vote. In a secret ballot election, the Union won by a vote of 14 to 5 with 6 challenged ballots. Rod-Ric filed eighteen objections to the election which were overruled by the Regional Director in his Supplemental Decision and Certification. Rod-Ric only took exception and

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[3]Hondo Drilling Co., 164 NLRB No. 67 (1967); Carl B. King Drilling Co., 164 NLRB No. 68 (1967).

[4]Such a request for board review was available under Section 102.67(b) of the Board's Rules and Regulations, 29 C.F.R. 102.67(b) (1970).

sought Board review of the Regional Director's action in overruling two of its objections regarding: (1) the failure of the Union to supply the company with a list of names and addresses of eligible employees, and (2) the applicability of the *Hondo* election formula.

Following certification, Rod-Ric refused the Union's request for bargaining information, expressing an intention to contest the validity of the certification.[8] The Union then filed the unfair labor practice charges here involved. The Trial Examiner granted judgment on the pleadings for the General Counsel finding a violation of §§ 8(a) (5) and (1) of the Act. In affirming the Trial Examiner, the Board found that Rod-Ric had waived all but two of its eighteen original objections to the conduct of the election by failing to except to the Regional Director's overruling of them in his Supplemental Decision and Certification. It further found that Rod-Ric's objection to the application of the *Hondo* eligibility principle had been resolved by the Regional Director in his Decision and Direction of Election to which the company took no exception. Consequently, the Board held the company was precluded from asserting this ground as a defense to the unfair labor practice charge. It found Rod-Ric's argument for extension of the *Excelsior* rule to Unions without merit.

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[8]Before the Board, Rod-Ric contended that the refusal to furnish the information was not a refusal to bargain, though it conceded "it would have refused to bargain if requested because the election was invalid." The Board rejected this contention, and it has apparently been abandoned by the Company.

I

Rod-Ric makes two arguments regarding the eligibility formula employed in the election: (1) Its original promulgation, in the *Hondo Drilling Co.*[6] representation proceeding, contravened the Administrative Procedures Act;[7] and (2) it was improperly applied in the present situation. We agree with the Board's contention that neither objection is properly before this court due to the company's failure to take pre-election exception to the eligibility determination. In our recent decision in *N.L.R.B. v. Louisiana Industries, Inc.*[8] this court stated:

> The employer's failure to appeal the ruling of the Regional Director prior to an election was a waiver of this point, and he may not raise the same issue as a defense to an unfair labor practice charge arising from his refusal to bargain with the successful union. N.L.R.B. v. Air Control Products of St. Petersburg, Inc., 335 F.2d 245 (5 Cir., 1964); N.L.R.B. v. Rexall Chemical Co., 370 F.2d 363 (1 Cir., 1967); N.L.R.B. v. Thompson Transport Co, 406 F.2d 698, 701-702 (10 Cir., 1969).

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[6] 164 NLRB No. 67 (1967), *enforced*, —— F.2d —— (5th Cir. 1970) [No. 27943, ——, 1970].

[7] 5 U.S.C. § 553. *See* N.L.R.B. v. Wyman-Gordon Co., 394 U.S. 759 (1969).

[8] 414 F.2d 227, 228 (5th Cir. 1969). In that case the Company contended that a contract between itself and an incumbent union was a bar to the election in which a new union prevailed, despite the fact that neither the Company nor the incumbent union had appealed the Regional Director's determination that it was not.

On the authority of *Board of Public Instruction v. Finch*,[9] *Rod-Ric* contends that the above principle does not bar appellate consideration of its objections to the eligibility formula. There, this court began its consideration of the present question with a statement of the general rule:

> "that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." United States v. L.A. Trucker Truck Lines, Inc., 1952, 344 U.S. 33, 37, 73 S.Ct. 67, 69, 97 L.Ed. 54, 58.[10]

We noted, however, that the rule was not without exception and concluded that review was appropriate in that case since HEW's action was:

> (1) in excess of statutory authority, (2) likely to result in individual injustice, (3) disruptive of the legislative scheme, and (4) contrary to an important public policy extending beyond the rights of the individual litigants.[11]

Of course, the application of the above mentioned criteria requires that the issues which the litigant seeks

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[9]414 F.2d 1068 (5th Cir. 1969). Here review was sought of an order of the Secretary of HEW terminating funds under the Civil Rights Act of 1964. HEW contended that the petitioner's arguments were not before the Court of Appeals since they had not been presented in the administrative proceedings.

[10]414 F.2d at 1072.

[11]414 F.2d at 1073 (citations omitted).

to raise initially before the Court of Appeals be meritorious. While Rod-Ric's contention that the *Hondo* rule was adopted in violation of the Administrative Procedures Act alleges the sort of administrative outlawry at which the *Board of Public Instruction* exceptions are directed, the question has been foreclosed on the merits by our decision on this date in *N.L.R.B. v. Hondo Drilling Co.*[12]

By contrast, the allegation that the *Hondo* formula was factually unsuited to the present situation merely challenges the exercise of the Board's broad discretion in a question of representation.[13] We conclude that this contention is wholly outside the principles followed in *Board of Public Instruction*.

II

Prior to the Rod-Ric election, the Regional Director requested the Union to furnish eligibility list information. The Union replied that it did not have such information, but would forward it "as quickly as it was received." The information was never supplied, and Rod-Ric contends that the election must be set aside on the authority of *Excelsior Underwear, Inc.*[14] As we noted in *N.L.R.B. v. Hondo Drilling Co.*,[15] the *Ex-*

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[12] ——— F.2d ——— (5th Cir. 1970) [No. 27943, ———, 1970].

[13] *Cf.* N.L.R.B. v. Zelrich Co., 344 F.2d 1011, 1015 (5th Cir. 1965); Neuhoff Bros., Packers v. N.L.R.B., 362 F.2d 611, 614 (5th Cir.), *cert. denied*, 386 U.S. 956 (1966).

[14] 156 NLRB 1236 (1966).

[15] ——— F.2d ——— (5th Cir. 1970) [No. 27943, ———, 1970] (Section II).

celsior rule does not apply to unions. Rod-Ric was, in effect, asking the Board to expand the rule. The Board found that the Union did not have the requested information and concluded that the argument for an extension of the rule was without merit.

The order of the Board is ENFORCED.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27942

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

ROD-RIC CORPORATION,
Respondent.

Before: Rives, Gewin and Ingraham, Circuit Judges.

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent Rod-Ric Corporation, its officers, agents, successors, and assigns on June 3, 1968. The Court heard argument of respective counsel on January 15, 1970, and has con-

sidered the briefs and transcripts of record filed in this cause. On June 16, 1970, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order. In conformity herewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Rod-Ric Corp., its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

ENTERED: Jul 8 1970

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27942

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

ROD-RIC CORPORATION,
Respondent.

On Application for Enforcement of an Order of the National Labor Relations Board (Texas case)

(August 25, 1970)

ON PETITION FOR REHEARING

Before RIVES, GEWIN and INGRAHAM,
Circuit Judges.

PER CURIAM: IT IS ORDERED that motion of respondent for leave to file a petition for rehearing out of time in this cause be and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the petition for rehearing filed in the above captioned and numbered cause be and the same is hereby DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 822

ROD RIC CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 39–46) is reported at 428 F. 2d 948. The decision and order of the National Labor Relations Board (R. 2–15) [1] are reported at 171 NLRB No. 134.

JURISDICTION

The judgment of the court of appeals (Pet. App. 46–47) was entered on July 8, 1970, and a petition for rehearing was denied on August 25, 1970 (Pet.

[1] "R." references are to the joint appendix filed in the court below.

488-888—70

App. 48). The petition for a writ of certiorari was filed on October 6, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an employer, by failing to seek timely review in the prior representation proceeding of eligibility standards prescribed for a union election by the Regional Director of the National Labor Relations Board, has waived his right to contest the validity of the standards in subsequent agency and court proceedings.

2. Whether the Board properly refused to set aside the election because the union failed to supply a separate list of names and addresses of eligible voters.

STATUTE INVOLVED

Section 8(a)(5) of the National Labor Relations Act (29 U.S.C. 158(a)(5)) provides in pertinent part:

> (a) It shall be an unfair labor practice for an employer—
>
> • • • • •
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

The other relevant provisions of the Act, as amended (29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 20–23.

STATEMENT

In August 1966, Local 826, International Union of Operating Engineers, AFL–CIO, filed an election petition with the National Labor Relations Board's

Regional Director seeking certification as the representative of Rod Ric Corporation's employees engaged in oil well drilling in the Permian Basin area of West Texas (R. 38). After a formal hearing, the Director ordered an election, applying as the standard for voter eligibility the formula used by the Board in two prior cases involving the Permian Basin oil industry (the "*Hondo* formula").[1] Under that standard, any employee in the company's employ a minimum of 10 days during the 90-day period preceding the Direction of Election who had not been terminated for cause or quit voluntarily prior to completion of his last job, and any employee on the payroll immediately preceding issuance of the Notice of Election, could vote (R. 42-43).[2] The Company was directed to supply a list of names and addresses of all "known" eligible

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[1] *Hondo Drilling Co.*, 164 NLRB 416, enforced, 428 F. 2d 943 (C.A. 5); *Carl B. King Drilling Co.*, 164 NLRB 419.

[2] In *Hondo*, the Board applied an eligibility standard different from the normal rule, which recognizes only employees employed during the payroll period immediately preceding the Direction of Election, because:

> • • • the employment practices in the oil well drilling industry differ substantially from those found elsewhere. For this reason, particular care must be taken to insure that our determination of voter eligibility takes into account the special pattern of employment evidenced here. • • • [A]lthough Hondo maintains an almost continuous drilling operation, the amount of time spent on a single drilling job is relatively short. Not all those employed by Hondo have a continuing interest in, or an expectancy of, reemployment as is indicated by the high turnover among its employees. However, all employees who have not been terminated for cause or who have not quit voluntarily before the completion of the particular job are

voters (see *Excelsior Underwear Inc.*, 156 NLRB 1236) (R. 43–44).[4]

The Board's rules provide that, within 10 days after service of the Regional Director's decision, a party may file with the Board a request for review (Pet. App. 31–32), but that (29 C.F.R. 102.67(f), Pet. App. 33):

> The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. • • •

No request for review was filed (R. 14, n. 1). After the Union had won the election (R. 45), the Company filed with the Director objections to the election on grounds, *inter alia*, that the *Hondo* formula could not properly be applied to its operation and that the Union had failed to furnish the names and addresses of eligible voters (R. 46, 47).

The Regional Director, after an administrative investigation, overruled all objections and certified

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considered eligible for reemployment with Hondo. Moreover, a significant number of these employees have maintained a continuing interest in employment with Hondo, as is evidenced by the fact that they have accepted reemployment and worked a substantial number of days during the year. [164 NLRB at 417.]

[4] The Director stated: "In view of the nature of the employment in this industry, both the Union and the Employer are directed to cooperate to the fullest extent in the preparation and compilation of an election eligibility list containing the names and addresses of all eligible voters" (R. 43).

the Union as the representative of the Company's employees (R. 45–54). He concluded that the eligibility question had been "previously considered and decided" in the proceeding ordering the election (R. 50). He also ruled that the Union's failure to furnish employee names and addresses did not warrant setting aside the election, since under the Board's *Excelsior* decision, only the employer's failure to do so justified that action (R. 52).[5]

The Board denied a Company request to review these two determinations,[6] finding that the request presented "no substantial issues warranting review" (R. 57–58). It added that from the Director's decision (see n. 5, *supra*) it appeared that the Union did not have any eligibility information it could furnish to the Company (R. 54).

The Company then refused the Union's request to bargain and the General Counsel of the Board issued a complaint alleging violations of Section 8(a)(5) and (1) of the Act (R. 3). The matter was referred to a trial examiner who granted the General Counsel's motion for judgment on the pleadings, finding that the Company's contentions raised issues which had been

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[5] The Director noted that before the election he had written the Union for eligibility information and the Union had replied that it had none but would forward any it received; none was forthcoming (R. 52).

[6] While the Company had filed 16 other objections to the election with the Director (R. 46–47), it filed exceptions with the Board respecting the Director's disposition of only the two mentioned above (R. 57–58). Under the Board's rules (29 C.F.R. 102.69(c) and 102.67(f)), the others are deemed to have been waived.

litigated in the representation proceeding (R. 5–7, 10). The Board affirmed, rejecting the Company's contention that it was entitled to an evidentiary hearing in the unfair labor practice proceeding (R. 14–15). It ordered the Company to cease and desist from the unfair labor practices, to bargain with the Union upon request, and to post appropriate notices (R. 14–15, 10–12).

The court of appeals enforced the Board's order. It held that the Company's objection to use of the *Hondo* formula was not "properly before [the] court due to the company's failure to take pre-election exception to the eligibility determination" (Pet. App. 43); it also agreed with the Board that the *Excelsior* rule "does not apply to unions" (Pet. App. 45–46).

ARGUMENT

1. The holding below that the Company waived its right to further consideration of its objection to application of the *Hondo* formula is correct; it is consistent with the admonition of this Court that "as a general rule [1] * * * courts should not topple over ad-

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[1] Contrary to the Company's contention (Pet. 11–13), the court of appeals properly refused to except this case from the general rule. As the court noted, the objection to application here of the *Hondo* formula rests essentially on the ground that the Company's operation is factually unsuited to that formula, an argument which merely "challenges the exercise of the Board's broad discretion in a question of representation" (Pet. App. 43). The Company's contention that the Board improperly engaged in rule-making in *Hondo* is insubstantial for the reasons given by the court in *National Labor Relations Board v. Hondo Drilling Co.*, 428 F. 2d 942, 946–947.

ministrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *United States* v. *Pacific Fruit Lines*, 344 U.S. 33, 37. Had the Company sought Board review of the Regional Director's eligibility ruling at the time he directed the election, possible errors (if any) that might have occurred could have been remedied by the Board before the election was held. Having awaited the outcome of the election to voice its objections, however, the Company is not in a position to have the election set aside and a new formal hearing held to determine eligibility, thereby delaying final resolution of the representation question.[5]

Accordingly, it was a reasonable exercise of its rule-making authority for the Board to provide that a party objecting to a Regional Director's representation determination must file a request for review with the Board within 10 days of that determination or be deemed to have waived its objections.[6] See, *e.g.*,

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[5] The Company contends (Pet. 10) that, since the Board had recently applied the *Hondo* formula in another case factually distinguishable from *Hondo*, it would have been futile to request Board review. This Court rejected a similar argument in *Pacific*, *supra*, 344 U.S. at 37, stating: "Repetition of the objection * * * might lead to a change of policy, or, if it did not, the [agency] would at least be put on notice of the accumulating risk of wholesale reversals being incurred by its persistence."

[6] Petitioner's assertion (Pet. 13–14) that its other objections to the election—the 16 objections made to the Regional Director but not pursued in its appeal to the Board (*supra*, n. 6)—should have been relitigated in the unfair labor prac-

National Labor Relations Board v. *Rexall Chemical Co.*, 370 F. 2d 363, 366 (C.A. 1); *National Labor Relations Board* v. *Louisiana Industries, Inc.*, 414 F. 2d 227, 228 (C.A. 5), certiorari denied, 396 U.S. 1039; *National Labor Relations Board* v. *Thompson Transport Company*, 406 F. 2d 698, 701–702 (C.A. 10); *National Labor Relations Board* v. *Difco Laboratories, Inc.*, 389 F. 2d 663, 668 (C.A. 6), certiorari denied, 393 U.S. 828.

2. The Company's contention (Pet. 15–17) that the Board should have set aside the election because the Union failed to supply names and addresses of eligible voters is also without merit. The Regional Director's Decision and Direction of Election (R. 43–44) did not order both the Union and the Employer to produce an *Excelsior* list; instead, while both were urged "to cooperate to the fullest extent in the preparation and compilation of an election eligibility list of all eligible voters," [10] the Company alone was "required" to furnish "an election eligibility list containing the names and addresses of all known eligible voters" (R. 43). Moreover, the Board's *Excelsior* requirement is designed to protect the union participants in an election from being placed at a disadvantage relative to the Employer in communicating with the employees. *National Labor*

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tice proceeding is subject to the same infirmity as its contention concerning application of the *Hondo* formula. Having failed timely to preserve these objections, it could not later raise them at its own convenience.

[10] There is no showing that the Union failed to cooperate. As the Board pointed out (*supra*, p. 5), it simply did not have any information requested.

Relations Board v. *Wyman-Gordon Co.*, 394 U.S. 759, 766. Since here the failure of the Union to furnish information placed the Employer in no worse communicative position than the Union, there is no valid basis for the complaint that this contributed to the Union winning the election.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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